No. 42141-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SUMMER V. RICHARDS, as duly appointed personal representative of the estate of BRIAN W. RICHARDS; SUMMER V. RICHARDS, individually; SUMMER V. RICHARDS, as duly appointed guardian of the estate and person of BRAEDEN F. RICHARDS, DOB 2-9-2002; SUMMER V. RICHARDS, as duly appointed guardian of the estate and person of LAELA L. RICHARDS, DOB 9-16-2004; and SUMMER V. RICHARDS, as duly appointed guardian of the estate and person of CHENAYA R. RICHARDS, DOB 5-11-2006,

Appellant,

v.

AMERICAN MEDICAL RESPONSE NORTHWEST, INC., a foreign corporation doing business in Washington; SCOTT SQUIRES; and LEWIS FOX,

Respondents.

ANSWERING BRIEF OF RESPONDENTS

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RESPONDENTS' ANSWERING BRIEF

I. SUMMARY OF ANSWERING ARGUMENT

The Opening Brief of Summer Richards ("Plaintiff") does not make a case for reversal of the verdict and judgment below.

Plaintiff has not appealed (and cannot appeal) from the judgment for a sanction under CR 37: (1) the judgment is separate from the one she *has* appealed, (2) Plaintiff did not object in the trial court when the sanction was awarded, and (3) Plaintiff received the fruits of the judgment and acknowledged its satisfaction. Additionally, the trial court's decision is factually and legally sound.

The trial court correctly awarded judgment as a matter of law to American Medical Response Northwest, Inc. ("AMR Northwest")[1] on Plaintiff's claim for negligent retention and supervision of Scott Squires and Lewis Fox. She failed to make a *prima facie* case. Plaintiff left multiple evidentiary chasms: Without expert testimony, the jury would have had to speculate

[1] In this brief, a reference to "AMR" means the three defendants collectively. "AMR Northwest" refers to the employer defendant.

whether AMR Northwest had a duty separate from that of Clark County regarding its emergency medical technicians ("EMTs"). Without expert (or indeed *any*) testimony to link former nonmedical performance issues with Squires and Fox to their alleged lack of *medical* competence, the jury would again be left to speculate. And without evidence of the supposed outcome if AMR Northwest had managed Squires and Fox differently, Plaintiff had another failure of proof.

Plaintiff also failed to establish the threshold requirement regarding impeachment through a prior conviction of witness Travis Hardin, that the conviction was probative of his credibility. Accordingly, no "balancing" of prejudicial effect was needed, but the trial court filled in that part in any event and did not abuse its discretion.

Nor did the trial court abuse its discretion when it gave Instruction No. 16, providing an element of AMR's theory of the case. The instruction neither overemphasized nor misled. The additional language Plaintiff desired was not relevant to the case, and Plaintiff (1) failed to preserve any error, (2) estopped herself

from claiming it now, and (3) gave no evidence to support her addition.

None of Plaintiff's assignments of error are well taken. The judgment below should be affirmed.

II. STATEMENT OF THE CASE

A. Events of June 8 and 9, 2006

During the evening of June 8, 2006, Brian Richards experienced chest pain and other symptoms, and he and his wife, Summer Richards, went to a local urgent care facility. RP 905. Defendant Arthur Simons, MD, examined Mr. Richards and obtained a 12-lead electrocardiogram (EKG). The EKG revealed no cardiac issues (RP 2067-2069), but Dr. Simons recommended further examination and testing at the emergency department. Mr. Richards declined the suggestion and returned home RP 2078-2082.

Early the following morning, Mr. Richards awoke with pain in his chest and called 911. RP 911-912. Emergency medical technicians ("EMTs") from Clark County Fire District 11 arrived at the Richards' home around 5:09 A.M. RP 916-917. The crew

included EMT Travis Hardin, who initiated care and obtained a 4-lead EKG. RP 917-918.

Defendants Scott Squires and Lewis Fox, employees of AMR Northwest, arrived shortly thereafter. Mr. Squires obtained a verbal report from Mr. Hardin that Mr. Richards' condition was improved, and Mr. Richards reported his chest pain was gone. RP 1448-1449; 1748-1749; 1776-1777. Mr. Squires reviewed the Fire District's EKG strip and found it did not suggest any cardiac issues. RP 1446-1447.

Mr. Squires recommended to Mr. Richards, more than once, that he accept transport to the hospital. RP 1457-1460, 1756-1757. Each time Mr. Richards declined. Because Mr. Richards was alert, oriented, and able to make decisions, "We couldn't at that point force him to go to the hospital." RP 1756. Accordingly, Mr. Squires reviewed with Mr. Richards a standard Clark County EMS Refusal Information Form (Ex. 101), discussing the various reasons why declining transport was not in Mr. Richards' best interest. Clark County Fire EMT Ian Fagan signed the form after it had been explained to Mr. Richards, confirming Mr. Richards' refusal to be

transported. The emergency responders then departed. RP 1464, 1472-1473, 1759, 1761. Squires and Fox had been at the scene for approximately 11 minutes. RP 1551.

About 18 hours later, Mr. Richards suffered a fatal cardiac event. An autopsy later determined Mr. Richards' cause of death to be occlusive atherosclerotic cardiovascular disease. Ex. 9.

B. Post-Incident Investigation

Following the June 9 morning visit to Mr. Richards' house, defendant Squires discovered he had erroneously entered and transmitted information from a previous public-assist call into the Prehospital Care Report (PCR) for Mr. Richards. RP 1484. Once the information was electronically transmitted, the error could not be reversed. *Id.* Mr. Squires subsequently notified his superiors, who asked him to draft an addendum explaining what care was provided on the Brian Richards call, and how the data were accidentally misdirected. RP 1487-1488. That misdirection, along with the fact that AMR returned to Mr. Richards' house later that day in connection with his fatal attack, triggered a review of the case. RP 493-494.

Heather Tucker, AMR Clinical Education Supervisor, called the office of Lynn Wittwer, MD, the Medical Program Director for Clark County EMS, to report the irregularity and its context. RP 494. Dr. Wittwer headed an investigation which ultimately resulted in the removal of Mr. Squires' lead-paramedic designation, and the case was forwarded to the State of Washington for further consideration. RP 493-494, 498. Dr. Wittwer and AMR were primarily concerned with deficiencies in charting of the event. RP 530, 531-532, 542-543, 841-843. Heather Tucker created an investigation report on June 21, 2006, summarizing concerns and recommendations from the initial investigation. RP 841-843. Mr. Squires' lead-paramedic designation was restored after he had satisfied the requirements imposed upon him. RP 423-424.

C. Discovery Sanction – Imposed and Paid

1. Plaintiff's Production Demands and AMR's Responses

During the course of the litigation, plaintiff brought several motions to compel production. Plaintiff's first motion to compel was for the production of AMR patient care protocols. CP 19. The trial court declined to enter an order, and AMR subsequently

produced all documents except Prehospital Care Reports (PCRs) for non-party patients. CP 316-317 (transmittal letter to Plaintiff's counsel, enclosing disk of documents).

Plaintiff filed a second motion to compel seeking production of the withheld PCRs. CP 72-75. The trial court subsequently ordered AMR to produce redacted PCRs authored by Mr. Squires and Mr. Fox for the 60 days preceding Mr. Richard's death, but only for those circumstances where the patient either refused transport or was not transported to the hospital for another reason. Order to Compel Production, CP ___; Sub. 92, 04-09-2010 (designation pending). AMR produced the reports in timely fashion.

Plaintiff brought a third motion, seeking production of the complete investigative file of AMR's Heather Tucker, and of all non-privileged AMR emails related to Mr. Richards. CP 154. Before the hearing on plaintiff's motion to compel, AMR found a copy of Ms. Tucker's investigative report, along with some other documents that would have been part of the investigative file, and immediately produced them to plaintiff. Despite an ongoing search, Ms. Tucker's investigative *file* still could not be located. CP

522-523 (AMR Response to Plaintiff's Motion to Compel). AMR offered to postpone the deposition of Pontine Rosteck, Ms. Tucker's supervisor, to allow plaintiff more time to review the report. Plaintiff declined the offer. CP 518. In fact, Plaintiff did not request reopening of any witness's deposition to inquire about the report. *Id.*

On Plaintiff's third discovery motion, the court ordered AMR to search exhaustively for the entire investigative file and for all emails related to Mr. Richards, to turn over any documents located as a result of that search by December 17, 2010, and to identify a CR 30(b)(6) designee who could answer questions about the discoverability of emails. CP 252, Order Granting Motion to Compel, 12-03-2010. AMR continued searching for the investigative file to no immediate avail, searched further for potentially responsive emails, and designated a 30(b)(6) witness.

2. Plaintiff's Motion for Sanctions

On January 6, 2011, plaintiff moved for sanctions under CR 37. CP 471. She claimed that the cumulative effect of AMR's delayed production (AMR was not in violation of any of the court's discovery orders) had caused substantial prejudice to her case. *Id.*

The primary sanction plaintiff requested was to strike AMR's Answer, thereby defaulting AMR as to liability. CP 503.

In its response, AMR pointed out its recent discovery that Plaintiff apparently had possessed the Tucker investigative report, often cited by Plaintiff as the "smoking gun" evidence, for almost two years. CP 511. Plaintiff had obtained the document through a Washington public records request, deciding for tactical reasons not to disclose that fact to the court or to AMR. CP 515. She had previously asserted to the court that she was substantially prejudiced by defendant's "late" production of the investigation report, despite her possession of the document very early in the litigation. RP 12/3/10, pp. 8-9.

At the hearing on Plaintiff's sanction motion, the court requested further briefing on alternate sanctions, and the parties complied. *See* CP 823 (Plaintiff's response) and CP 1399 (AMR's response). After reviewing all the briefing, the court imposed a sanction on AMR. Specifically, the court ordered that AMR should pay all attorney fees and any costs associated with Plaintiff's motions to compel, as well as the costs of any reopened depositions

(of which there were none). RP 25-27. Plaintiff did not object to the sanction the court imposed on AMR. *Id.*

3. Sanction Judgment – Entered, Paid, and Satisfied

Plaintiff claimed fees and costs of $43,295 and submitted a form of Judgment and Order to that effect. The trial court allowed the claim and entered the Judgment and Order on April 15, 2011. CP 1413. AMR paid the judgment, Plaintiff signed her acknowledgment of full satisfaction, and the Satisfaction was filed on May 5, 2011. CP 1416.

4. Note on Heather Tucker Investigative File

On February 1, 2011, AMR's counsel delivered a letter and accompanying Declaration of David John Fuller to the trial court, with copies to Plaintiff's counsel (*see* App.-3 – App.-5), reporting that the original Tucker investigative file was discovered on January 27, 2011 in a box at an AMR storage crawl space at its Hazel Dell office.[2] The full investigation file was provided to the

[2] Neither the letter nor the Fuller declaration found their way to the court file, and to that extent they are outside the record of this case. AMR (continued . . .)

court and Plaintiff's counsel at the same time. The Fuller Declaration states that although the area had previously been searched, the file had not been found. It was discovered only by accident, as AMR employees were looking for payroll records pertinent to an unrelated union grievance matter and found the file in a box labeled "CES [Clinical Education Services] 2008-09." App.-5.

D. Facts Concerning Negligent Retention/Supervision Claim Against AMR Northwest

AMR is a private ambulance company that contracts with Clark County to be the sole provider of ambulance services in the county. RP 467. The State appoints a physician Medical Program Director (MPD) to each county, under whose license all EMS providers within the county operate. RP 465-466, 472-473. The MPD provides clinical protocols for the EMS personnel, oversees clinical performance, recommends certification of EMS personnel to the State, monitors and ensures continuing education requirements

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(. . . continued)
asks the Court to take judicial notice of them pursuant to ER 201(b)(2) and (d).

are met, and performs quality assurance reviews. RP 465-466. In conjunction with the State, the MPD determines whether any adverse action will be taken against the certification of EMS personnel. RP 528. Operational or non-clinical guidelines and performance evaluations are maintained by entities such as AMR who directly employ the EMS personnel. RP 470-471, 527.

Mr. Squires and Mr. Fox were both hired by AMR in 2000 as paramedic and an EMT-IV, respectively. CP 175; RP 1323. During their employment Mr. Squires and Mr. Fox had non-medical personnel issues, which are discussed later in this brief (pp. 30-31). None of the personnel issues concerning Mr. Squires or Mr. Fox dealt with their ability to provide medical care to patients.

E. Witness Hardin

AMR moved *in limine* to bar any reference to the Class C felony conviction of witness Travis Hardin. Mr. Hardin was one of the Clark County Fire District 11 responders at the June 9, 2006 morning encounter with Mr. Richards (*supra* p. 4). The following year, Mr. Hardin was convicted in Oregon of encouraging child sex abuse in the second degree, and at the time of trial he was

incarcerated. Because of his unavailability, the parties agreed to the reading of pre-selected portions of Mr. Hardin's deposition at trial. RP 1308, 1650-1651. The court allowed AMR's *in limine* motion, and the jury was informed only that Mr. Hardin was unavailable. RP 1363-1364, 1726-1727.

F. Jury Instruction No. 16

In its proposed jury instructions, AMR submitted proposed Instruction No. 29, to instruct the jury on the qualified immunity statutorily provided to emergency medical responders like Scott Squires and Lewis Fox. CP 1086. Specifically, AMR wanted an instruction based on RCW 18.71.210, which provides for conditional immunity from liability for actions performed in good faith. AMR's proposed instruction provided language directly from the immunity statute.

The court and the parties agreed to conduct a thorough analysis of the proposed jury instructions off the record, with the understanding that the parties would have the opportunity to raise their objections on the record after the instructions were finalized. RP 2268-2269, 2321.

The following morning, the trial court presented the parties with what it believed to be the agreed-to instructions based on the off-the-record discussions that occurred the night before. RP 2330, 2342-2345. The court identified the statutory immunity instruction (CP 1325) as Instruction No. 16. The parties reviewed the instructions and put their objections on the record. RP 2344-2363. Plaintiff did not object to Instruction 16 at that time. (*Id.*, RP 2366). Likewise, plaintiff did not request the court add the second paragraph of the statute to Instruction No. 16. (*Id.*).

After closing argument the parties put their formal exceptions on the record. Plaintiff excepted to Instruction 16, but not on any basis she raises now on appeal RP 2518; *infra* pp. 43-44.

III. RESPONSE TO PLAINTIFF'S ARGUMENTS

A. DISCOVERY SANCTION UNDER CR 37

1. The Sanction Judgment Is Final. It Is Paid, Is Satisfied, and Has Not Been Appealed.

Plaintiff moved for a discovery sanction under CR 37 (*see* Plaintiff's Motion for Sanctions, CP 477). She admits the trial court "granted plaintiff's motion for sanctions" (Judgment and Order p. 2; CP 1414), awarding Plaintiff attorney fees and costs related to her

"motions to compel defendant AMR to comply with the discovery rules and for sanctions," in the amount of $43,295 (*id.*).

The Judgment and Order, submitted by Plaintiff's counsel, entered separately from and actually after the Final Judgment, was final and enforceable in its own right. *Compare* CP 1370 (Final Judgment) with CP 1413 (Judgment and Order on sanction)). Moreover, AMR *paid* the Judgment and Order, Plaintiff acknowledged "**full** satisfaction of the judgment recovered * * * in the sum of $43,295.00" (emphasis in original), and Plaintiff's Satisfaction of Judgment was filed with the trial court. CP 1416.

The Final Judgment makes no reference to the sanction award. In her Notice of Appeal (CP 1364-1365), Plaintiff has appealed from "the Final Judgment [referred to as 'Judgment'] * * * and any prior interlocutory rulings that became final and reviewable upon entry of the Judgment and that prejudicially affect the Judgment."

The Final Judgment finalized the jury's verdict and rulings related to the trial. By Plaintiff's choice, the trial court's ruling on the discovery sanction motion was reduced separately to a final

judgment that was paid and satisfied. That is the end of it. The sanction Judgment and Order became final and reviewable upon *its own* entry, not upon entry of the Final Judgment. It was not "interlocutory" to the Final Judgment, nor did it affect the Final Judgment in any way.

Not only *did not* Plaintiff appeal from the sanction Judgment and Order, she *could not* appeal from it. The court allowed her sanction motion and disposed of the entire CP 37 claim, but differently than Plaintiff wanted (attorney fees and costs of $43,295.00 instead of striking of AMR's answer). Plaintiff acquiesced in the court's ruling, preparing and submitting a form of final judgment on the claim. The judgment was entered, paid and satisfied.

Estoppel by judgment precludes relitigation of any issue (here, Plaintiff's sanction claim) if the issue actually was contested, decided, and reduced to judgment. "When a claimant wins a judgment, all possible grounds for the cause of action are said to be merged into that judgment and are not available for further litigation." *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 328,

941 P.2d 1108 (1997). Moreover, the finality bar would exist even in the absence of the CR 54(b) finality declaration in the Judgment and Order. *See Ensley v. Pitcher*, 152 Wn. App. 891, 900-901, 222 P.3d 99 (2009) (summary judgment).

2. RAP 2.5(b)(1) Also Bars Plaintiff's Challenge to the Award.

Even if Plaintiff had appealed from the Judgment and Order, she has collected on it and acknowledged its satisfaction. The Rules of Appellate Procedure speak to that situation. As relevant here:

> "A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision only * * * (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision."

RAP 2.5(b)(1).

Even if Plaintiff had preserved her objection below, and even if she had then appealed from the sanction Judgment and Order (she has done neither), her acceptance of the fruits of the Judgment would bar review of the award by this Court. Plaintiff does not fall within the exception of RAP 2.5(b)(1)(iii). Plaintiff is not contending that she should receive attorney fees greater than the $43,295 she has

collected. If she prevailed on the argument she is making to this Court, the Judgment and Order would be set aside. Striking of AMR's answer (defaulting AMR as to liability but not as to damages) would not be "at least the benefits" of the $43,295 award, because (1) Plaintiff would fall back to zero on monetary recovery, and (2) even if Plaintiff won a larger monetary award from AMR at retrial (that remains to be seen), it would be damages, not attorney fees. The attorney fee sanction she had lost would not be regained, much less improved on.

The exception in RAP 2.5(b)(1)(iii) is categorical. The result on review *must* be "at least the benefits" previously received, and here that result is not possible.

3. The Trial Court Did Not Abuse Its Discretion in Making the $43,295 Sanction Award.

Plaintiff is making this argument for the first time. Below, she did not assert that the sanction was insufficient, nor even that the trial court was in error not to have struck AMR's answer. Instead, she obtained a final judgment on the sanction (CP 1413) and acknowledged satisfaction when AMR paid it (CP 1416) .

(a) Standard of Review

An appellate court overturns a trial court discovery sanction decision only if the decision is manifestly unreasonable or based on untenable grounds. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). The grounds are "tenable" if the court relies on supportable facts and applies a correct legal standard. If the court's view is one that a reasonable person could take, it is not "manifestly unreasonable." *Mayer*, 156 Wn.2d at 684. "An appellate court can disturb a trial court's sanction only if it is clearly unsupported by the record." *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 583, 220 P.3d 191 (2009).

(b) Legal Standard for Sanction Award

CR 37 sets forth the rules for discovery sanctions. CR 37(b) lists the sanctions a court may impose in its discretion for failure to obey a discovery order. They include, among others, striking of pleadings (up to and including a default).

However, before one of those "harsher remedies" under CR 37(b) can be imposed,

> "the record must clearly show (1) one party willfully or deliberately violated the discovery rules and orders,

> (2) the opposing party was substantially prejudiced in its ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would have sufficed."

Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

Because it was Plaintiff who sought and now seeks the harshest of all available sanctions – a default – it was her burden to ensure the completeness of the record below:

> "The law is well settled * * *. When a trial court imposes dismissal or default in a proceeding as a sanction for violation of a discovery order, it must be apparent from the record that (1) the party's refusal to obey the discovery order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed."

Rivers v. Conf. of Mason Contractors, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002) (citing to *Burnet*, 131 Wn.2d at 494).

Any claim Plaintiff makes now of the trial court's failure to make a record on the three *Burnet* factors (*see* Opening Brief p. 25) is invited error.

(c) Trial Court's Consideration of the Relevant Factors

Consequently, Plaintiff will lose if she is correct that the trial court failed to make a reviewable record to support the default remedy she seeks here. However, it appears the trial court *did* properly account for and analyze the *Burnet* factors in deciding to impose the sanction it did.

(1) Willfulness

The court was disturbed by AMR's failure to find and produce the "smoking gun" Heather Tucker report before November 10, 2010. 1/14/11 RP 97. The court was also concerned by AMR's failure to disclose or claim privilege for other documents, mainly emails, until after the court's December 14 Order that compelled their production (CP 252-254). 1/14/11 RP 107-108.

The trial court's first order to compel (Sub. 292, 04-09-2010) had dealt solely with AMR's prehospital care reports, and AMR had complied. AMR responded to the second order (dated December 14, 2010) on December 17, 2010 (1/14/11 RP 107), having previously (in the trial court's view) failed to respond adequately to interrogatories about the documents (1/14/11 RP 97). Sanctions

under CR 37(b) can be imposed only for failure to comply with a discovery order, not for inadequate production. The trial court noted an initial inclination to find willfulness (1/14/11 RP 106), but it would be difficult to find willful noncompliance with a December 14, 2010 Order that required action by December 17, 2010, when AMR actually met the deadline. 1/14/11 RP 107.

(2) Prejudice

The trial court evidently determined that Plaintiff was not materially prejudiced. AMR had not informed Plaintiff about the Heather Tucker report until AMR's counsel reported its probable discovery on November 3, 2010 (1/14/11 RP 103 – it was found and produced on November 10, and AMR delivered more material on November 30). Plaintiff claimed the document was a "smoking gun," critical to her ability to discover further evidence, but unknown to the trial court or anyone else, it had been in her counsel's possession long before then. 1/14/11 RP 87-88. The trial court was understandably perturbed with Plaintiff:

> "THE COURT [to Plaintiff's counsel]: I specifically asked some questions and, had I known you had that [the Heather Tucker report], I could have ruled differently [on the December 14 discovery order].
>
> * * * *
>
> "I'm fairly certain I would have ruled differently, had I known some of these things and we wouldn't be in the position we're in today [considering Plaintiff's sanction motion]."
>
> "[PLAINTIFF'S COUNSEL]: Your Honor, I don't think that – I don't think that we ever misled the Court in any way about –"
>
> "THE COURT: I disagree with you."

1/14/11 RP 88-89.

> "THE COURT: Again, the prejudice on the [Heather Tucker] report, I – frankly, we had it and you chose tactically not to use it [to pursue further discovery], then there's different prejudice."

1/14/11 RP 117.

AMR's counsel informed the trial court that when the Heather Tucker report was discovered (he did not know Plaintiff's counsel already had it), he offered to postpone the deposition of Pontine Rosteck, Ms. Tucker's supervisor, but Plaintiff's counsel had declined the offer. Nor, according to AMR's attorney (Plaintiff's

attorney did not contest the fact), did Plaintiff ever ask to reopen any deposition as a result of AMR's response to the December 14, 2010 discovery order. The trial court wondered aloud, "[H]ow is there prejudice when [Plaintiff] already had the report[?]" 1/14/11 RP 106. At the March 4, 2011 hearing, when the court made its decision to sanction AMR, the court confirmed that it "did review all the pleadings" and that in accordance with its inclinations announced on January 14, "I'm not striking the pleadings [but] I am, however, going to find that there are sanctions to AMR." RP 26.

(3) Lesser Available Sanctions

Plaintiff has failed to discuss this part of the record. At the close of the December 14 hearing, the trial court specifically directed the parties to brief available alternative sanctions:

> "I will ask that both parties – principal parties in this motion file why other sanctions aren't available and, if they are, what you think the lesser sanctions could be."

12/14/11 RP 119.

Plaintiff and AMR responded with memoranda. CP 823 (Plaintiff's submission); CP 1399 (AMR's submission). Each side

proposed and discussed available sanctions, which the trial court confirmed it had reviewed. RP 26.

4. Conclusion

Plaintiff's afterthought challenge on appeal to the trial court's sanction is procedurally barred by her own actions and legally untenable as well. She has made no reviewable record, has not appealed the sanction judgment, is objecting to it for the first time in this Court, and has not shown that the trial court abused its discretion or misunderstood the law in any way.

B. NEGLIGENT RETENTION/SUPERVISION CLAIM AGAINST AMR NORTHWEST

Plaintiff's arguments on this assignment of error miss the point of the trial court's ruling on AMR's motion for judgment as a matter of law under CR 50(a)(1). Plaintiff was required to supply a legally sufficient evidentiary basis to make a *prima facie* case on all elements of her claim against AMR Northwest for negligent supervision and retention of employees Squires and Fox. The trial court described her case as weak at the close of evidence and said more after deliberating on it. In ruling on the motion, the court flatly

declared, "I don't think the evidence is there at all" (RP 1834), and the court was right.

1. Standard of Review

This Court reviews *de novo* a decision to direct a verdict. The standard for judgment as a matter of law is to view all material evidence and reasonable inferences in favor of the nonmoving party, and if no substantial evidence is presented to create a *prima facie* case, the motion is granted as a matter of law. *Boeing Company v. Sierracin Corporation*, 108 Wn.2d 38, 67, 738 P.2d 665 (1987); *Winkler v. Giddings*, 146 Wn. App. 387, 395, 190 P.3d 117 (2008); *Swinford v. Russ Dunmire Olds.*, 82 Wn. App 401, 415, 918 P.2d 186 (1996), *review denied*, 130 Wn.2d 1024 (1997).

2. Elements of Plaintiff's Claim

The elements of a claim for employer negligence in hiring, retention, or supervision of an employee are (1) a duty to the plaintiff, (2) a breach of the duty, and (3) injury to the plaintiff proximately caused by the breach. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 306, 151 P.3d 201 (2006). Here, Plaintiff failed to

provide evidence that could proximately link any act or omission of AMR Northwest to Plaintiff's injury.

3. Plaintiff Failed to Make a *Prima Facie* Case.

Plaintiff's brief treats her negligent retention and negligent supervision claims as one (pp. 32-37), so AMR will respond accordingly. As Plaintiff has pleaded and attempted to present it, her claim is that AMR Northwest's failure to act on evidence it had about Scott Squires and Lewis Fox prior to June 9, 2006, by terminating or reassigning them, was the proximate cause of Mr. Richards' injury.

(a) Duty

The threshold question is whether in the unique circumstance where AMR Northwest is franchised by Clark County as a sole provider (RP 1007), and where its emergency medical technicians are certified (and decertified) and provided with ongoing education through Clark County and the State of Washington (RP 1008-1010), the ultimate duty to provide patients in Clark County with qualified and competent EMT personnel lies with the certifying authority rather than with AMR Northwest. Analogizing AMR Northwest's

position to that of a licensed hospital supervising its physicians, and arguing that government licensing and regulation does not remove the employer/hospital's independent duty (Opening Brief pp. 33-34), Plaintiff cites to *Pedroza v. Bryant*, 101 Wn.2d 226, 232, 677 P.2d 166 (1984). *Pedroza* undermines Plaintiff's argument.

The abstract proposition, that an entity like AMR Northwest *may* have a legal duty, does not answer Plaintiff's failure here to provide sufficient evidence of (1) where the duty actually lies, and (2) what constitutes a breach of any such duty. As the Washington Supreme Court realized in *Pedroza*, by citing prominently to *Johnson v. Misericordia Comm'ty Hosp.*, 99 Wis.2d 708, 301 N.W.2d 156 (1981) (*Pedroza*, 101 Wn.2d at 230), a hospital's duty to use certain procedures to evaluate applications for staff privileges (or here, AMR Northwest's duty to use certain procedures to evaluate the medical performance of its EMTs) is "not within the realm of the ordinary experience of mankind * * * [so that] expert testimony was required to prove the same." *Johnson*, 301 N.W.2d at 172. Plaintiff alludes to no expert testimony, and there was none, establishing what if anything AMR Northwest was required to do,

beyond what Clark County was already doing, to establish the medical competence of its EMTs.

The trial court correctly saw that because of the dual supervision of EMTs by AMR Northwest and Clark County, Plaintiff could not automatically lay the duty at the feet of AMR Northwest. Without expert testimony it would be sheer speculation. *See* RP 1833.

(b) Breach and Proximate Causation

Even assuming that AMR Northwest and not Clark County *did* have the duty, it could not be liable to Mr. Richards unless it breached the duty to him, and the breach proximately caused Mr. Richards' injury. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. at 306.

Plaintiff's complaint is that Squires and Fox provided deficient medical care to Mr. Richards, and that AMR Northwest negligently allowed them to do it. However, Plaintiff provided no evidence that either Squires or Fox had ever had patient care issues during their employment by AMR Northwest. Instead, Plaintiff offered evidence that in 2003 and before (Ex. 21) Mr. Squires had been written up for tardiness (RP 1316, 1320-1321), that he had

issues with documentation (RP 1318-1319, 1322), and that he was involved in a preventable collision (RP 1320). Plaintiff offered evidence that Mr. Fox (whose role was to assist Mr. Squires – RP 1604) had been written up in 2004 and earlier (Ex. 22) for weaving in and out of traffic (RP 1323), for posting his vehicle in the wrong location, and for sleeping on his shift (RP 1325, 1328). Mr. Fox had prior anger problems (RP 1325) and had received substandard performance reviews in areas other than to patient care (RP 1328-1329). In no case and at no time was any deficiency in patient care noted, either for Mr. Squires or for Mr. Fox. There was no evidence that either of them had violated any medical care protocols, or had in any way failed to provide proper care to any patient.

That created a huge gap between the evidence Plaintiff offered and her desired conclusion, that AMR Northwest knew or should have known that Squires and Fox would give improper care to Mr. Richards on June 9, 2006, much less cause Mr. Richards'

death.[3] Where the question is medical care, and even where the claimed negligence is directly medical, a lay jury must be provided with *expert* testimony to link the evidence to causation of the injury. *See Winkler v. Giddings*, 146 Wn. App. 387, 394, 190 P.3d 117 (2008) (directed verdict; expert testimony is required to establish most aspects of causation); *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001) (summary judgment; expert testimony is required where an essential element is best established by opinion that is beyond the expertise of a layperson). Moreover, the expert testimony must be based on facts in the case at hand, not on speculation or conjecture. *Seybold*, 105 Wn. App. At 677.

Here, the jury was given nothing at all from which a lay jury could infer that the work habits of Mr. Squires or Mr. Fox, unrelated to patient care, indicated any rational likelihood of substandard patient care or causation of Mr. Richards' death. Just as a physician's questionable diagnosis cannot be linked to breach of

[3] In fact, the jury found that neither Mr. Squires nor Mr. Fox was responsible for Mr. Richards' injury, and that Mr. Richards' comparative fault was 100 percent. Special verdict, CP 1341-1343.

duty or malpractice without admissible expert testimony, so too cannot the prior conduct of Messrs. Squires and Fox, unrelated to patient care, imply their proclivity to any negligence in treatment of Mr. Richards on June 9, 2006. Without proper testimony to make the connection, and as the trial court accurately noted, "[I]t would be merely speculative to say this is what could happen, this is what AMR could have done." RP 1833.

After a lengthy trial at which Plaintiff had every opportunity to show what AMR Northwest knew about the work performance of Squires and Fox, the trial court concluded after full reflection that the evidence was "[not] there at all" to link AMR's knowledge to a breach of duty or causation of Mr. Richards' injury. RP 1834. The trial court did not err.

C. IMPEACHMENT OF WITNESS HARDIN

Travis Hardin was convicted of, and at the time of trial was incarcerated for, the Oregon Class C felony of encouraging child sexual abuse in the second degree (ORS 163.686). None of the elements of the offense involve dishonesty or false statement, and

Plaintiff has not claimed otherwise.[4] Consequently, when Plaintiff opposed AMR's *in limine* motion (CP 919-922) and sought to elicit evidence of Mr. Hardin's conviction to impeach his truthfulness as a witness, she did it pursuant to ER 609(a)(1).[5]

The key word in ER 609(a)(1) for this appeal is "probative." Plaintiff argues at length that the trial court supposedly failed to balance adequately the probative value of admitting evidence of Mr. Hardin's conviction against the prejudice to AMR from the jury's knowing of the conviction. Opening Brief pp. 38-44. Plaintiff's argument speaks of how great or little would be the *prejudice* in admitting the evidence, but Plaintiff made no record below to support the showing she had to make first, that the evidence was *probative* of Mr. Hardin's credibility.

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[4] The elements (*see* ORS 163.686(1)) are: (1) Possessing or obtaining depictions of, or observing, sexually explicit conduct by a person under 18 years of age; and (2) knowledge or awareness that the conduct is child abuse.

[5] ER 609(a) states the "General Rule" that evidence of a witness's prior conviction is admissible to attack his or her credibility "only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered * * *."

Plaintiff tries to argue (Opening Brief pp. 41-42) that "clandestine" activity is enough to make a conviction probative of untruthfulness, but the law is against her on that. First, Plaintiff has created the "clandestine" test with no authority to support it. Second, there is no such element to the crime in question (*see* footnote 4, p. 33 *supra*). Third, nothing in the record indicates that Mr. Hardin was any more clandestine about what he did, than would be someone committing an assault and leaving the scene to avoid arrest, or a drunken driver taking back roads to avoid detection (*See* Opening Brief p. 41 – Plaintiff admits crimes like those are generally "irrelevant to veracity"). Finally and as a matter of law, possession of an illicit substance or material (be it drugs or child pornography) does not in itself indicate any level of dishonesty and is not probative of witness veracity. *See State v. Calegar*, 133 Wn.2d 718, 723, 727, 947 P.2d 235 (1997) (possession of drugs, adding that "'few prior offenses that do not involve crimes of dishonesty or false statement are likely to be probative of a witness' veracity.'" 133 Wn.2d at 722.)

Plaintiff failed in the trial court to carry or even to address the initial burden, which *she* bore, of establishing that Mr. Hardin's conviction was probative of his veracity:

> "We again affirm that position and caution prior convictions not involving dishonesty or false statements are not probative of the witness's veracity until the party seeking admission thereof shows the opposite by demonstrating the prior conviction disproves the veracity of the witness."

State v. Hardy, 133 Wn.2d 701, 708, 946 P.2d 1175 (1997).

Plaintiff asserts that the trial court did not consider the probity vs. prejudice balancing test under *State v. Alexis*, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980). The court was aware of the test and used it. *See* 4/29/11 RP 15. The analysis was not needed, however, because Plaintiff had failed to demonstrate Mr. Hardin's conviction was probative of his veracity. Before the court could *admit* evidence of Mr. Hardin's prior conviction, it would have had to consider the prejudice factors, *Calegar*, 113 Wn.2d at 722, but the court's *rejection* of the evidence here, where it was incumbent on Plaintiff to carry the burden of persuasion, does not require that record. A prior conviction is not presumed to be probative (*Hardy*, 133 Wn.2d

at 708), and if Plaintiff did not carry her burden, she failed at the threshold. On the other hand, by its very nature evidence of a prior conviction *does* carry a presumption of prejudice (*See State v. Burton*, 101 Wn.2d 1, 9, 676 P.2d 975 (1984)), so the "balancing" would be complete at that point.

In fact the trial court did note the probative/prejudicial balance, and to the extent any balancing was needed, the record shows the trial court's great concern that evidence of a conviction involving child pornography (much like one involving drugs – *see Hardy*, 133 Wn.2d at 706), is likely to have a disproportionately prejudicial effect. RP 1365 (court says the nature of Mr. Hardin's crime is "exactly the reason" why the evidence would be "overly prejudicial"). That factor in itself tipped the balance against admission, even if all other factors were benign and even if the conviction was at all probative of the witness's veracity.

The trial court did not abuse its discretion, and its ruling should be affirmed.

D. JURY INSTRUCTION NO. 16

Plaintiff argues that the trial court's giving of Instruction 16 was error because (1) the court "spontaneously added" the instruction, (2) Instruction 16 overemphasized AMR's case, and (3) the failure to include a "missing part" of RCW 18.71.210 in the instruction misled and confused the jury. Opening Brief pp. 20-22, 44-50.

CR 51(f) details the procedure for trial court record-making on jury instructions:

- First, the court hands the parties copies of the instructions it intends to give. Here, the court did that the morning after an off-the-record conference. RP 2344 ("Everybody read what I put together * * *.")

- *Then*, counsel shall have the opportunity in the absence of the jury to make objections to instructions given or not given. RP 2344 (The Court: "If there's something * * * we discussed last night, then all the parties agree to take exceptions after closings.")

- Exceptions must be stated distinctly and specifically.

Plaintiff's brief (pp. 20-22) glosses over the record she made and did not make below. When asked for exceptions on the record, Plaintiff's counsel objected to Instruction No. 16 on the single

ground that "it's never been given before," which her co-counsel immediately contradicted, "That's not true." RP 2518. None of Plaintiff's counsel alluded to any other ground.

The following month, on the afternoon before oral argument of the new trial motion, Plaintiff submitted a declaration (CP 1392) attempting to "mend the hold" with her counsel's recollections from the off-the-record discussion of instructions. At no point in the new trial motion argument did the trial court indicate agreement with the contents of the declaration. In the declaration, Plaintiff's counsel recalled that he argued against Instruction No. 16 on the ground that it would confuse the jury. CP 1393 ¶ 4.

With respect to the additional recollection of Plaintiff's counsel that he had asked for addition of another paragraph from the statute in Instruction No. 16 (CP 1393 ¶¶ 5-7), AMR's counsel said in response that he recalled no such request or objection. 4/29/11 RP 11.

1. The Instruction Was Not a "Spontaneous" Invention of the Trial Court.

Plaintiff says the trial court "spontaneously" added Instruction No. 16 before the jury began deliberations (Opening Brief p. 20). The instruction was not spontaneous. It was a modification of AMR's requested Instruction No. 29 (Liability for Emergency Medical Responders, CP 1086), which itself was taken from RCW 18.71.210. The requested instruction, and the modification the trial court gave as Instruction No. 16, carried forth AMR's defense that emergency medical responders like Squires and Fox were conditionally immune from liability for actions performed in good faith. Contrary to the implication of surprise or prejudice that Plaintiff may intend, neither she nor the jury were blindsided by an unexpected instruction.

2. Instruction No. 16 Did Not Overemphasize.

The Court should be aware that Plaintiff did not present this argument to the trial court. Of necessity, a claim of instructional error must be preserved in time for the trial court to consider a timely correction before the jury has deliberated. *See Salas v.*

Hi-Tech Erectors, 168 Wn.2d 664, 671 fn. 2, 230 P.3d 583 (2010) (stating the purpose of the preservation requirement).

Plaintiff argues now that Instructions Nos. 8, 18, 19, and 20 "together" told the jury that Squires and Fox would not be liable for simple negligence if they acted in good faith. The idea that the jury would have to pick its way through four different instructions, all of them requested by Plaintiff and not AMR,[6] is enough in itself to show that Instruction No. 16 was necessary if AMR was to present its theory of the case succinctly to the jury.

A ground rule of jury instructions is that a party is entitled to instructions consistent with its theories of the case. *Housel v. James*, 141 Wn. App. 748, 758, 172 P.3d 712 (2007). From Plaintiff's four instructions the jury would learn abstractly about gross negligence and willful misconduct, it would hear about burdens of proof for establishing Squires' and Fox's good faith, and it would learn disjointedly about additional burdens first if it did, and second if it did not, find their conduct was in good faith. That is Plaintiff's

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[6] *See* Plaintiff's Proposed Jury Instructions, CP 1212, 1214, 1215, and 1216. *Compare* AMR's proposed jury instruction, CP 1086.

theory of the case – that Squires and Fox did not act in good faith (so they were liable), but even if they did, they were grossly negligent or willful (so they were liable). With Instruction No. 16, the jury heard AMR's theory of the case – that Squires and Fox were entitled by law to qualified *immunity* from liability if they acted in good faith.

Far from overemphasizing or repeating, Instruction No. 16 gave the jury its only concise statement of AMR's theory of the case. And even if Instruction No. 16 *were* redundant, Plaintiff did not show that she was prejudiced by the supposed redundancy. *Daly v. Lynch*, 24 Wn. App. 69, 73, 600 P2d 592 (1973).

3. The Jury Was Neither Confused nor Misled by Instruction No. 16 as Given.

If the Court accepts Plaintiff's counsel's after-the-fact declaration as making a record under CR 51(f) (*see supra* p. 38), part of this argument is preserved.[7] However, it is plain from the entire record that the trial court exercised sound discretion in giving Instruction No. 16, and that Plaintiff suffered no prejudice.

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[7] However, the argument that Plaintiff was deprived of the ability to argue a theory of her case is not one she can make here. *See* pp. 44-45 *infra*.

The parties are agreed that Instruction No. 16 is supported by substantial evidence, is consistent with AMR's theory of the case, and correctly states the law. The only remaining question is whether the instruction, read singly or in context with other instructions, confused or misled the jury into finding that Squires and Fox acted in good faith and without either gross negligence or willful or wanton misconduct (Special Verdict Form Questions 1, 3-5, 6, 8-10). *See Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995) (instructions are adequate if they do not mislead the jury). Moreover, Plaintiff had to show how the jury was *prejudicially* misled or confused by the instruction into making those findings. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (even a misleading instruction is not reversible unless prejudice is shown).[8]

[8] Plaintiff's citation at page 46 of her Opening Brief to *Bell v. State*, 147 Wn.2d 166, 52 P.3d 503 (2002), is not on point. There, the statute *itself* was inapplicable to the case, and the instruction was thereby misleading. 147 Wn.2d at 177. Plaintiff does not contend that RCW 18.71.210 is inapplicable here.

(a) Plaintiff's Failure to Preserve the Claimed Error

Plaintiff contends that the jury was misled or confused mainly because the court did not include another part of RCW 18.71.210 in Instruction No. 16 (Opening Brief pp. 46-49). That part excludes an emergency medical technician from immunity if the act or omission in question "is not within the field of medical expertise of the * * * emergency medical technician."

Most of Plaintiff's argument about the missing paragraph is that "it deprived Ms. Richards of a statement of governing law that addressed one of her theories of the case," that if the missing part had been included, "[she] could have explained to the jury that by its own terms the statute does not apply in situations like this one, where the emergency responders acted outside their expertise." Opening Brief pp. 48-49.

Only in her lawyer's post-judgment declaration (CP 1394 ¶ 7) does anything approaching a "theory of the case" argument appear. The court did not acknowledge that Plaintiff's counsel had made that argument to it at trial. AMR's counsel, who was there, did not recall

hearing it. 4/29/11 RP 11. Unless this Court believes counsel's self-serving declaration can substitute for on-the-record argument to the court, the Court cannot consider this part of Plaintiff's argument. *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 702, 853 P.2d 908 (1993) (appellate court may consider claimed error in instruction only if appellant raised the specific issue by exception at trial).

(b) Judicial Estoppel to Claim Error

Even if the declaration is given weight here, Plaintiff cannot present the argument because she is judicially estopped. A party cannot assert one position in a court proceeding and later seek an advantage by taking a clearly inconsistent position. *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008) (so stating). Plaintiff says the court's alleged error "deprived [her] of a statement of governing law that addressed one of her theories of her case." However, she had said the opposite at trial:

> "THE COURT: * * * Is there anything that's not given that's going to hamper anybody from giving their theory of the case, or is there anything in there that's an inaccurate statement of the law?"
>
> "[PLAINTIFF'S COUNSEL]: No."

RP 2373.

> "THE COURT: So we – and everybody agrees that the instructions given allowed you to argue your theories of the case?"
>
> "[PLAINTIFF'S COUNSEL]: Yes."

RP 2516.

Plaintiff told the trial court her theories of the case were covered by the instructions as given, and the court relied on that statement. She cannot say otherwise on appeal.

(c) Absence of Evidence to Support Plaintiff's Requested Language

Furthermore, even if Plaintiff preserved her claim of error and is not estopped by her own statements, she still cannot prevail. There was no evidence to support the additional language. The statutory language in question deals with inapplicability of the qualified immunity to emergency medical technicians who operate "not within [their] field of medical expertise." Plaintiff provided no evidence whatever that either Mr. Squires or Mr. Fox could have been liable for anything they did outside their field of expertise as emergency medical technicians.

Plaintiff apparently admits in her Opening Brief (p. 48) that violation of paramedic protocols, if Squires and Fox had committed them, would be a breach of EMT standards of care as they worked *within* their field of expertise. She goes on, however, to claim that Mr. Fox's advice to Mr. Richards to "try apple cider vinegar" was evidence enough to remove Mr. Fox from the liability protection of RCW 18.71.210, and the jury should have been told as much.

There is no evidence that Mr. Richards suffered resultant harm from the advice. Moreover, the language Plaintiff wanted in Instruction No. 16 is irrelevant to Plaintiff's claim. Taking Plaintiff's evidence at its strongest, Mr. Fox thought Mr. Richards' problem was gastric, not cardiac, so transport to a hospital was not indicated. Even from the record Plaintiff has cited, the decision whether or not to transport is within the field of expertise of an emergency medical technician. *See* RP 763 (Q. "[T]ransport is the goal [of EMT work], isn't it?" A. "[Y]es.") The trial court was well within its discretion, if Plaintiff has made a reviewable record of it, in declining to add unneeded language to Instruction No. 16.

(d) The Jury's Question to the Court

Finally, Plaintiff argues that the jury's question to the trial court showed prejudicial juror confusion about Instruction No. 16. Opening Brief pp. 49-50.[9] She has not designated the jury's written Question or the court's detailed Answer for the Clerk's Papers, so AMR has done so. *See* Question from Jury and Court's Answer, CP ____-____; App.-1 – App.-2 (Sub. 207, 03-25-2011, Designation pending, appended to this brief for the Court's reference).

The Question (App.-1) deals as much with Instructions Nos. 18-20 (Plaintiff's instructions) as with Instruction No. 16.[10] The jury may have overlooked that the court's Instructions Nos. 18-20 (CP 1327-1329) mentioned only Squires and Fox, and not Dr. Simons. AMR's requested Instruction No. 29 (CP 1086) was

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[9] Plaintiff's "presumption of prejudice" argument about instructional error (presuming Instruction No. 16 *was* erroneous) is mistaken. *See Magaña v. Hyundai Motor America*, 123 Wn. App. 306, 317, 94 P.3d 987 (2005) (presumption holds only where instruction misstates the law). Plaintiff agreed that all the instructions stated the law correctly. RP 2373.

[10] The jury's Question: "If we have decided that Squires, Fox, and Simons appear to have provided emergency medical services in good faith, do we have to answer question 12?" App.-1, CP ____.

also specific to Squires and Fox, and all the parties had overlooked the trial court's inadvertent omission of that specificity in its modified version, Instruction No. 16.

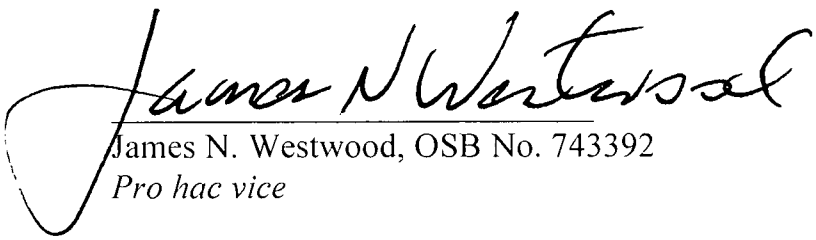
The trial court's Answer to the jury (App.-2, CP ____) covers much more than Instruction No. 16. It is a full page of detailed instructions about how the jury is to fill out its Special Verdict Form (CP 1341-1345), of which two lines (the third paragraph out of seven) correct the court's omission by adding that "Jury Instruction 16 does not apply to Dr. Arthur Simons." App.-2, CP ____. The court's Answer clarifies for the jury the application of Instructions Nos. 16, 18, 19, and 20, among others, by providing a roadmap. It is clear from the jury's accurate and unambiguous completion of the Special Verdict Form, including its allocations of fault (Question 14) and its marking out of damages (Question 12), that the jury was neither confused nor misled. The trial court's Answer to the jury, in which all the parties concurred (RP 2541-2542), simply and concisely cleared up any confusion that may have existed about completion of the Special Verdict.

IV. CONCLUSION

This case was fairly tried to a fully informed jury that returned a proper verdict. The trial court's discretionary and legal rulings are sound. The judgment should be affirmed.

Dated January 20, 2012.

STOEL RIVES LLP



James N. Westwood, OSB No. 743392
Pro hac vice

KEATING JONES HUGHES PC

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Peter D. Eidenberg, WSBA No. 40923

Attorneys for Defendants-Respondents

APPENDIX

2

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY

FILED

MAR 25 2011

Scott G. Weber, Clerk, Clark Co.

QUESTION FROM DELIBERATING JURY

Jurors: If, after carefully reviewing the evidence and instructions, you need to ask the court a procedural or legal question that you have been unable to answer, then write down your question on this form. Please print legibly. Do not state how the jury has voted.

JURY'S QUESTION: If we have decided that Aguirre, Fox, and Simons appear to have ~~Went not~~ provided emergency medical services in good faith, do we have to answer question 12?

DATE AND TIME: 3/24 3:36 pm

Tracy Nolta
Presiding Juror's Signature

COURT'S ANSWER (after consulting with attorneys): See Attached

DATE AND TIME: 3/24/11

Rich Melnick
Rich Melnick, Judge

207a

If you find Scott Squires provided emergency medical services in good faith, proceed to answer questions 3, 4, and 5.

If you find Lewis Fox provided emergency medical services in good faith, proceed to answer questions 8, 9, and 10.

There is no "good faith" jury question for Dr. Arthur Simons. Jury Instruction 16 does not apply to Dr. Arthur Simons.

If you answer "yes" to any of the questions 2, 3, 4, or 5 you must attribute some percentage of fault to Scott Squires in question 14. If you answer "no" to all of the questions 2, 3, 4, and 5, do not attribute any percentage of fault to Scott Squires in question 14.

If you answer "yes" to any of the questions 7, 8, 9, or 10 you must attribute some percentage of fault to Lewis Fox in question 14. If you answer "no" to all of the questions 7, 8, 9, and 10 do not attribute any percentage of fault to Lewis Fox in question 14.

If you answer "yes" to question 11 you must attribute some percentage of fault to Dr. Arthur Simons in question 14. If you answer "no" to question 11 do not attribute any percentage of fault to Dr. Arthur Simons.

If you enter "yes" to any of the questions 2, 3, 4, 5, 7, 8, 9, 10, or 11, proceed to answer the rest of the questions. If you enter "no" to all of the questions 2, 3, 4, 5, 7, 8, 9, 10, and 11 you need not proceed to any other questions.

Rick Schmick
24 March, 2011

KJH
KEATING
JONES
HUGHES·P.C.
ATTORNEYS AT LAW

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February 1, 2011

Via Hand Delivery

Honorable Rich Melnick
Clark County Superior Court
1200 Franklin Street
Vancouver, WA 98660

Re: ***Richards v. AMR, Scott Squires & Lewis Fox***
Clark County Superior Court Case No. 08-2-08862-0
Our File No. 00066-0011

Scott G. O'Donnell
Licensed in Oregon
and Washington
sodonnell@keatingjones.com

Dear Judge Melnick:

Within the last few days, my client has located the Heather Tucker investigation file, the most significant outstanding discovery issue in this case. I have enclosed a copy of a declaration from Dave Fuller explaining the circumstances under which this file was located. I have also enclosed a copy of the investigation file. Mr. Fuller's declaration and the investigation file have previously been provided to the other parties in this case.

Respectfully,

Scott G. O'Donnell
sodonnell@keatingjones.com

SGO:lc

Enclosure

cc w/o enc: Michael Wampold
Grant A. Gehrmann
John E. Hart / Aaron Potter

SUPERIOR COURT OF WASHINGTON

FOR CLARK COUNTY

SUMMER V. RICHARDS, as duly appointed personal representative of the estate of BRIAN W. RICHARDS; SUMMER V. RICHARDS, individually; SUMMER V. RICHARDS as duly appointed guardian of the estate and person of BRAEDEN F. RICHARDS, DOB 2-9-2002; SUMMER V. RICHARDS as duly appointed guardian of the estate and person of LAELA L. RICHARDS, DOB 9-16-2004; and SUMMER V. RICHARDS as duly appointed guardian of the estate and person of CHENAYA R. RICHARDS, DOB 5-11-2006,

Plaintiff,

v.

AMERICAN MEDICAL RESPONSE NORTHWEST, INC., a foreign corporation doing business in Washington; SCOTT SQUIRES; LEWIS FOX; and ARTHUR SIMONS, M.D., a medical doctor practicing medicine in Washington; and MOUNTAIN VIEW MEDICAL PLLC, a Washington Corporation doing business in Clark County,

Defendants.

Case No. 08-2-08862-0

DECLARATION OF DAVID JOHN FULLER

David John Fuller declares as follows:

///

KEATING JONES HUGHES P.C.
One Southwest Columbia, Suite 800
Portland, Oregon 97258-2095
(503) 222-9955

1. I am General Manager for AMR in Clark and Cowlitz Counties, a position I have held since September 2003. I previously gave a deposition in this case. I make this Declaration on personal knowledge.

2. My operations office for AMR is located in Hazel Dell, Washington. We have a two-story building where vehicles are parked along with offices and some storage space.

3. We have a storage area, which is more like a crawl space because the ceiling is approximately four feet high, where some materials are stored. Much of that storage space contains old contract materials between AMR and Clark County from prior to 2004. We also store payroll and scheduling records, as well as proof of use forms for controlled drugs in that area. We box up the scheduling and payroll records at the end of the year and place yearly records in that area at the beginning of the new year.

4. Brian Lohner and Charity Chapman, AMR employees, were within the last week looking for scheduling and payroll records for a union grievance matter. While searching there in the storage area, they came across a box on January 27, 2011 which was labeled CES 2008-09. CES stands for Clinical Education Services. They looked inside the box and found the Squires / Richards file.

5. Staff members had previously looked in this storage area for the Squires / Richards file more than a year ago but were not able to locate it. I do not know how or when the Squires / Richards file came to be placed in the box in the storage area where it was found.

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE ABOVE INFORMATION IS TRUE AND ACCURATE.

David John Fuller

KEATING JONES HUGHES, P.C.
One Southwest Columbia, Suite 800
Portland, Oregon 97258-2095
(503) 222-9955

CERTIFICATE OF SERVICE

I certify that I served true copies of the foregoing ANSWERING BRIEF OF RESPONDENTS on the following persons by first class U.S. Mail on January 20, 2012:

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Peterson Young Putra
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Seattle, WA 98101-3677

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Attorney at Law
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James N. Westwood
Of Attorneys for Respondents